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Muhammad Lukman bin Mohamad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-05(M)-452–09 OF 2018
YAACOB MD SAM, ZABARIAH YUSOF AND RAVINTHRAN JJCA
18 MAY 2020

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Criminal Procedure — Dangerous Drugs — Trafficking — Whether processing of cannabis to produce delta-9-tetrahydrocannabinol ('THC') in oil form for sale as medicinal product contravened Dangerous Drugs Act 1952 ('the DDA') — Whether so long as THC was listed as dangerous drug under First Schedule of DDA any unauthorised dealing in the THC could amount to trafficking under s 39B(1)(a) of the DDA — Whether DDA did not stipulate any specific weight for THC to constitute trafficking — Whether even possession of miniscule amount of THC might be an offence under the DDA — Whether trial judge's failure to rule whether accused rebutted presumption of trafficking invoked against him under s 37(da) of DDA fatal and entitled accused to set aside his conviction

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On finding that the prosecution had proven its case against the appellant beyond reasonable doubt on three charges of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), the High Court convicted and sentenced the appellant to death. The first two charges referred to the appellant's trafficking in, respectively, 3,010ml and 1,422g of

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delta-9-tetrahydrocannabinol ('THC') while the third charge related to trafficking in 279.81g of cannabis. It was the prosecution's evidence that the said drugs were recovered by a police party which raided a rented house occupied solely by the appellant and his wife. The police party found various paraphernalia in the house which led them to conclude that the house was used

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to process cannabis in order to make delta-9-tetrahydrocannabinol in an oil form which was bottled and sold by the appellant online, especially via his Facebook, purportedly as a medicine for curing various ailments. The trial judge called for the defence after finding that the prosecution had, at the end of its case, proven the appellant's custody and control of the drugs and invoked

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the presumption of trafficking under s 37(da) of the DDA. The trial judge found that the defence was a bare denial and failed to raise any reasonable doubt on the prosecution's case. The appellant relied on three grounds of appeal in his instant appeal against conviction and sentence: (a) that with regard to the first two charges, the prosecution had not established the exact

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weight of the THC as the drug was mixed with other components such as grape seed oil and the government chemist ('SP6') had not done any quantitative analysis of the THC in those two charges; (b) alternatively, the drugs mentioned in the first two charges were medicinal cannabis and therefore any kind of dealings in the THC should not be considered as 'drug trafficking'

under the DDA; and (c) with regard to the third charge, the trial judge's failure to make a ruling on whether or not the appellant had rebutted the statutory presumption of trafficking was fatal and entitled him to an acquittal.

Held, unanimously affirming the convictions and sentences with respect to the first two charges; setting aside the conviction and sentence on the third charge but finding the appellant guilty of possession under that charge pursuant to s 6 of the DDA and sentencing him to seven years' jail and ten strokes of whipping:

(1) The failure of the chemist (SP6) to do any quantitative analysis of the THC in the first and second charges was not fatal nor an issue because: (a) THC was a dangerous drug under Part III of the First Schedule of the DDA. There was no requirement under law requiring the actual weight to be stated for charges of trafficking for such drugs. Sections 37(da) and 39A(2) of the DDA did not require THC to be stipulated as to its weight. In other words, even possession of 0.01ml of THC was sufficient to attract an offence under the DDA; (b) what had to be proved under the first and second charges were that the THC was a dangerous drug under the First Schedule of the DDA, the drugs were under the custody, control and possession of the appellant and he was trafficking in them; and (c) once the trial court had found that the elements of possession and trafficking (by way of 'manufacturing') in the THC had been proven, the amount or quantity of the THC seized was irrelevant and the court was entitled to convict for trafficking (see para 52).

(2) The trial judge was justified in accepting SP6's evidence as more credible compared to that of SD7 as SD7 had never done any analysis on THC but had only attended courses on the same. SD7 was not a qualified chemist certified by the Chemistry Department of Malaysia. His evidence appeared to be purely theoretical in nature. In comparison, SP6 was a qualified chemist certified by the Chemistry Department and had vast experience in analysing various types of drugs. The defence did not adduce any other expert evidence to rebut SP6's evidence. Hence, SP6's evidence stood unrebutted (see paras 54–56).

(3) The appellant's contention that the manufacturing of the cannabis was for medicinal purposes for the public good and should not be caught by the mischief that the DDA sought to eradicate, had no merit. The trial judge had considered that contention at great length and was justified in agreeing with the prosecution's submission that in the absence of any acknowledgement or verification by the Health Ministry or any medicinal practitioners of any medicinal or health benefits of cannabis, whatever claim made by the defence that cannabis had medicinal benefits only amounted to quackery or the promotion of fraudulent or ignorant medical practices. The act of the appellant in manufacturing THC was subject to the laws of the country, especially the DDA. No exemption or

licence had been granted to the appellant to possess, manufacture, handle, process or sell the drug whether under the DDA or any other laws (see paras 58, 60 & 62–63).

(4) With respect to the third charge, the trial judge did not err in invoking the presumption of trafficking after having affirmatively found the element of possession proven. The judge had also properly evaluated the evidence of the defence. However, because the trial judge failed to rule at the end of the defence's case on whether the appellant had rebutted the presumption of trafficking, that failure entitled the appellant to have the conviction and sentence on the third charge set aside (see paras 65–69).

(5) With respect to the third charge, the trial judge did not err in invoking the presumption of trafficking after having affirmatively found the element of possession proven. The judge had also properly evaluated the evidence of the defence. However, because the trial judge failed to rule at the end of the defence's case on whether the appellant had rebutted the presumption of trafficking, that failure entitled the appellant to have the conviction and sentence on the third charge set aside (see paras 71–82)

[Bahasa Malaysia summary

Berdasarkan dapatan bahawa pendakwaan telah membuktikan kesnya melampaui sebarang keraguan munasabah dibawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta), mahkamah tinggi telah mensabitkan dan menjatuhkan hukuman mati kepada perayu. Dua pertuduhan pertamayang dirujuk kepada perayu yang dikatakan telah melakukan pengedaran, iaitu, 3,010ml dan 1,422g delta-9-tetrahydrocannabinol (THC) manakala pertuduhan ketiga berkaitan dengan pengedaran 279.81g kanabis. Adalah keterangan pendakwaan bahawa dadah tersebut telah ditemui oleh pihak polis yang menyerbu satu rumah sewa yang didiami oleh perayu dan isterinya sahaja. Pasukan polis tersebut menemui beberapa paraphernalia dalam rumah tersebut yang menyebabkan mereka merumuskan bahawa rumah tersebut digunakan untuk memproses kanabis untuk membuat delta-9-tetrahydrocannabinoldalam bentuk satu minyak yang kemudiannya dibotolkan dan dijual oleh perayu secara atas talian, terutamanya melalui muka Facebook miliknya, dikatakan sebagai ubat untuk menyembuhkan beberapa penyakit. Hakim bicara memanggil tertuduh untuk membela diri selepas membuat dapatan bahawa pendakwaan telah diakhir kesnya, membuktikan milikan dan kawalan perayu ataas dadah tersebut dan menggunakan anggapan pengedaran dibawah s 37(da) Akta. Hakim bicara mendapati bahwa pembelaan adalah satu penafian kosong dan gagal untuk membangkitkan apa-apa keraguan munasabah terhadap kes pendakwaan. Perayu bergantung kepada alasan rayuan dalam rayuan ini terhadap sabitan dan hukuman: (a) berkaitan dengan dua pertuduhan pertama, pendakwaan tidak membuktikan berat sebenar THC kerana dadah tersebut telah dicampur dengan komponen lain seperti minyak biji anggur dan ahli kimia kerajaan

(SP6) tidak melakukan apa-apa analisa kuantitatif terhadap THC dalam kedua-dua pertuduhan terebut; (b) secara alternative, dadah yang dinyatakan dalam dua pertuduhan pertama adalah kanabis untuk tujuan perubatan dan oleh itu, apa-apa penggunaan THC tersebut tidak sepatutnya dianggap sebagai 'pengedaran dadah' dibawah Akta; dan (c) berkaitan dengan pertuduhan ketiga, kegagalan hakim bicara untuk membuat dapatan sama ada perayu telah mematahkan anggapan statutori adalah fatal dan membenarkannya untuk mendapatkan satu pembebasan.

Diputuskan, sebulat suara mengekalkan sabitan dan hukuman berkaitan dengan dua pertuduhan pertama dan mengetepikan sabitan dan hukuman untuk pertuduhan ketiga tetapi mendapati perayu bersalah untuk milikan dibawah s 6 Akta dan mensabitkannya dengan tujuh tahun pemenjaraan dan sepuluh kali sebatan:

(1) Kegagalan ahli kimia (SP6) untuk menjalankan apa-apa analisa kuantitatif THC dalam pertuduhan pertama dan kedua adalah tidak fatal ataupun menjadi satu isu kerana: (a) THC adalah dadah berbahaya dibawah Bahagian III Jadual Pertama Akta. Tiada keperluan dibawah undang-undang yang memerlukan berat sebenar untuk dinyatakan untuk pertuduhan mengedar dadah tersebut. Seksyen 37(da) dan 39A(2) Akta tidak memerlukan THC untuk dinyatakan beratnya. Dalam perkataan lain, walaupun milikian 0.01ml THC adalah memadai untuk mewujudkan satu kesalahan dibawah ABD; (b) apa yang perlu dibuktikan dibawah pertuduhan pertama dan kedua adalah bahawa THC adalah dadah berbahay dibawah jadual pertama Akta, dan dadah tersebut berada dibawah milikan dan kawalan perayu dan dia mengedarnya; dan (c) apabila mahkamah bicara mendapati elemen milikan dan pengedaran (dengan cara 'pembuatan') dalam THC telah dibuktikan, amaun atau kuantiti THC yang dirampas adalah tidak relevan dan mahkamah berhak untuk mensabitkan atas pengedaran (lihat perenggan 52).

(2) Hakim bicara mempunyai justifikasi dalam menerima keterangan SP6 sebagai lebih kredibel berbanding dengan SD7 memandangkan SD7 tidak pernah menjalankan apa-apa analisa atau THC dan hanya pernah menghadiri kursus mengenainya. SD7 bukanlah seorang ahli kimia bertauliah yang disahkan oleh Jabatan Kimia Malaysia. Keterangannya hanya berbentuk teori. Apabila dibandingkan, SP6 adalah seorang ahli kimia yang disahkan oleh jabatan kimia dan mempunyai pengalaman luar dalam menganalisa pelbagai jenis dadah. Pembelaan tidak mengemukakan apa-apa keterangan pakar lain untuk mematahkan keterangan SP6. Oleh itu, keterangan SP6 kekal tidak dipatahkan (lihat perenggan 54–56).

(3) Hujahan perayu bahawa pembuatan kanabis adalah untuk tujuan

perubatan untuk kepentingan awam dan tidak harus ditangkap dengan kesalahan yang Akta cuba untuk banteras, tidak mempunyai apa-apa merit. Hakim bicara telah menimbangkan hujahan tersebut dan mempunyai justifikasi untuk bersetuju dengan hujahan pendakwaan bahawa dalam ketiadaan apa-apa pengakuan atau pengesahan daripada Kementerian Kesihatan atau mana-mana pengamal perubatan atau faedah kesihatan kanabis, atau apa-apa pengataan yang dibuat oleh pembelaan bahawa kanabis mempunyai apa-apa faedah kesihatan hanya terjumlah kepada cara mengubat yang palsu atau penganjuran pengamalan perubatan berasaskan frod atau jahil. Tindakan perayu dalam membuat THC adalah tertakluk kepada undang-undang negara, terutamanya Akta. Tiada pengecualian atau lessen telah diberikan kepada perayu untuk memproses, membuat, mengususkan atau menjual dadah tersebut dibawah Akta atau apa-apa undang-undang lain (lihat perenggan 58, 60 & 62–63).

(4) Berkaitan dengan pertuduhan ketiga, hakim bicara tidak terkhilaf dalam menggunakan anggapan pengedaran selepas mendapati elemen pemilikan telah dibuktikan. Hakim juga telah mengamati keterangan pembelaan dengan betul. Namun, kerana hakim bicara gagal untuk membuat dapatan di akhir kes pembelaan sama ada perayu telah mematahkan anggapan pengedaran, kegagalan tersebut membenarkan perayu untuk mengetepikan sabitan dan hukuman atas pertuduhan ketiga (lihat perenggan 65–69).

(5) Berdasarkan fakta dan keterangan kes, hakim bicara mempunyai justifikasi dalam mendapati bahawa perayu terlibat dalam pembuatan THC untuk tujuan penjualan (lihat perenggan 71–82).]

Cases referred to

Lee Boon Siah & Ors v PP and other appeals [2014] 2 MLJ 652, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Ooi Hock Kheng v PP [2014] 5 MLJ 585, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC; [2007] 4 CLJ 337 (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 37(d), 37(da), (da)(vi), 39A(2), 39B(1)(a), 39B(2), Part III, Schedule

Appeal from: Criminal Trial No 45A-83–09 of 2016 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Nazran bin Mohd Sham (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zabariah Yusof JCA:

[1] The appellant was charged with three charges under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The three charges read as follows:

1st Charge:

> Bahawa kamu pada 7 Disember 2015 pada jam lebih kurang 6.45 petang bertempat di rumah No: 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 3010 mililiter jenis DELTA-9-TETRAHYDROCANNABINOL dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

2nd Charge:

> Bahawa kamu pada 7 Disember 2015 pada jam lebih kurang 6.45 petang bertempat di rumah No: 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 1422 gram jenis DELTA-9-TETRAHYDROCANNABINOL dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

3rd Charge:

> Bahawa kamu pada 7 Disember 2015 pada jam lebih kurang 6.45 petang bertempat di rumah No: 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 279.81 jenis Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The learned trial judge found that the prosecution had proved its case beyond reasonable doubt for the three charges and convicted and sentenced the appellant on the three charges under s 39B(1)(a) of the DDA. Aggrieved with the decision, the appellant appealed against the conviction and sentence on the three charges.

[3] After hearing the oral submissions and perusing through the written submissions of both parties, unanimously we found no appealable error on the decision of the learned trial judge on the first and the second charges. As such the appeal by the appellant against the first and the second charges were dismissed and we confirmed the conviction and sentence imposed by the

learned trial judge in respect of the same.

[4] As for the third charge, we find there is merit in the appeal which warrants appellate intervention on our part. We therefore set aside the conviction and sentence under s 39B(1)(a) on the third charge and substituted it with a conviction under s 6 of the DDA punishable under s 39A(2) and sentenced the appellant to an imprisonment term of seven years from the date of arrest and ten strokes of whipping.

[5] Herein below are our reasons for deciding so.

BACKGROUND

[6] On 7 December 2015, a police team led by Insp Mohd Hurairah Alinur bin Mohd Zaid ('SP7') raided a house at an address as per the charges, as the house was suspected to be carrying on activities of drugs trafficking.

[7] When SP7 and four of his team raided the said house, the appellant appeared shocked and stunned. SP7 found in the hall, apparatus and paraphanelias for smoking cannabis under the stairs and there were also cardboard boxes which SP7 suspected to be used for packing drugs. At that time the wife of the appellant Nadiah bt Rahmat ('SP10') had just completed her prayers.

[8] SP7 checked the boxes which were found under the stairs and he found numerous Pos Laju receipts, packages of caps of vape bottles and vape bottles. At the kitchen, SP7 found two trays filled with 90 bottles (filled with liquid suspected to be cannabis oil) and the said trays were on an oven. It was also found a jar of biscuits, a slow cooker and a box containing oil.

[9] A yellow bag was found on a mattress upon inspection of the appellant's bedroom and in it was found to contain drugs suspected to be cannabis.

[10] SP7 found in the middle room, a glass cylinder bottle and boxes of wrapping papers. SP7 subsequently prepared a search list and marked the items which were seized and handed over the same to the investigating officer, SP9.

[11] The items which were seized and suspected to be drugs were sent to the chemist, Khairul Hadi bin Hj Abdul Raof ('SP6') for analysis. SP6 testified that the 'tumbuhan mampat' marked as AA-1 is cannabis weighing 232.9g. As to the items 'ranting bahan tumbuhan' marked as AA-2 was analysed to be cannabis weighing 13.39g.

[12] The plastic bag marked as H13 which was filled with 'bahan tumbuhan hancur' and oil was found to contain delta-9-tetrahydrocannabinol weighing around 505.3g. A plastic bag marked as U-2 had similar content weighing 375.3g. The plastic marked as U-1 which consisted of 'bahan tumbuhan hancur' has a net weight of 460.9g of delta-9-tetrahydrocannabinol. The box marked as 'S' which contained plastic container marked as 'S-1' filled with 'ranting bahan tumbuhan' which after initial analysis by SP6 was confirmed as cannabis with a net weight of 33.52g.

[13] Apart from the aforesaid, the biscuits and bottles which were seized from the appellant's house had traces of cannabis or delta-9-tetrahydrocannabinol.

THE FINDINGS OF THE HIGH COURT JUDGE

[14] On the first element that the drugs seized from the appellant are as listed under the first Schedule of the DDA, the learned trial judge was satisfied with the evidence of the chemist. The learned trial judge found that SP6 was a credible witness and that the method employed by him on analysing the substance seized was acceptable and there is no doubt on the net weight of the drugs as stated in P60. It had been proved that the substance are dangerous drugs as listed under the first schedule of the DDA and bore the weight as stated in the charges (para 9 of the grounds at *RR Jld* 1 at p 16).

[15] The learned trial judge correctly set out the relevant principle to consider in determining the element of custody and control. Along with custody and control is the element of knowledge. Both to be proved either by direct or circumstantial evidence. As to knowledge a presumption can be drawn under s 37(d) of the DDA (*Leow Nghee Lim v Reg* [1956] 1 MLJ 28; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337).

[16] The learned trial judge considered the importance of determining whether the cannabis which was found in the house occupied by the appellant was intended for 'manufacturing'. Premised on the facts of the case, whereby the apparatus and the materials which were found, is believed to have been used for the processing of cannabis to produce delta-9-tetrahydrocannabinol, shows that the appellant 'manufactures' delta-9-tetrahydrocannabinol. Cannabis is used as the prime ingredient in the process to produce the same which are the subject matter for the first and second charges.

[17] The issue here is whether the prosecution had proved that the appellant 'manufacture' drugs. The evidence of SP10, the wife of the appellant, said that the appellant had utilised the apparatus as can be seen from P56. The packaging was done by the appellant. SP10 did not help the appellant in the

manufacturing or packaging of the drugs. The fact that the appellant sells the drugs via his facebook proved that the appellant was trafficking in the said drugs. All these findings of the apparatus and the ingredient in the house show strong circumstantial evidence that the appellant was carrying out activities of manufacturing delta-9-tetrahydrocannabinol in the amount as stated in the charges. Through the evidence of SP10 and SP2, it was established that the said house was only occupied by the appellant and SP10.

[18] As for the third charge, despite SP7 said that he did not record where the bag P20 was found and the failure on his part to make any marking on the same, the learned trial judge was satisfied with the explanation by SP7 as to why he failed to do the necessary records and markings.

[19] In the present case, the drugs which were found in P20 are of the same type with the drugs in the first and the second charges. When SP7 seized the drugs it was in the presence of the appellant. Hence an inference could be made that the drugs were found and were seized from the same premise whereby the appellant had custody and control.

[20] The prosecution had proved the elements of custody and control of the drugs in the third charge. As to the element of trafficking on the said charge, the learned trial judge invoked s 37(da) of the DDA as the possession of the said drugs was beyond the minimal weight as stipulated under the said section, namely 200g or more of cannabis (see para (vi) of the s 37(da) of the DDA).

[21] The element of trafficking was established for the third charge and a prima facie case proved against the appellant for the third charge and the appellant was called to enter his defence on the charges.

THE CASE FOR THE DEFENCE

[22] The appellant in his defence testified that when he opened the door, the police team had inspected every part of the house and the appellant said that he did not know that there were drugs in the house.

[23] The appellant said that the items were sent by Zainal Hafiz bin Zaine ('SD2') who is also known as 'Janggut', as SD2 had moved house to Terengganu. SD2 had asked the appellant to fill the oil from the big bottles into the smaller bottles as he had no time to do so.

[24] The appellant knew that the oil is cannabis but he claimed it was used as medicinal purposes to cure various ailments. The said oil was sold online in the website 'Health-Care'. The appellant presumed that such act does not contravene any law.

[25] The appellant said that the yellow bag, P20 which contained the drugs was only shown to him at the police station.

[26] When the appellant was cross examined, he denied the presence of any apparatus or paraphenalias found on the floor in the hall used for smoking cannabis and denied that he had knowledge that the drugs seized by the police were cannabis.

[27] The evidence of SD2 was that before he went to Terengganu, he had met with the appellant to send grape seed oil in several bottles and several boxes of wrappings to the appellant. It was only after that, that SD2 knew that the appellant had been arrested.

[28] The evidence of Muhammad Fakhrul Amin bin Mohd Tahar ('SD3') was that he went over to the appellant's house to help in the packaging of the 'oils' and posting to the various customers. SD3 did not have any knowledge that the oil contained 'cannabis' and said that the yellow bag, P20 which contained drugs cannabis does not belong to him or SD2.

[29] Latifah bt Ma'sor ('SD4'), the mother to the appellant and Mohammad Hafiz Hukmi bin Wardi ('SD5'), the brother in law to the appellant, only gave evidence with regards to the personal character of the appellant before his arrest.

[30] The evidence of Muhammad Aris bin Mohd Mokles ('SD7') who is a lecturer of University Putra Malaysia said that the methodology used by the chemist, SP6 in Chemistry Department Malaysia in the extraction of the drugs in the form of liquid was insufficient and was outdated. SD7 agreed that cannabis was acknowledged to have some health benefits in our country. SD7 also agreed that he is not a qualified chemist certified by the Chemistry Department of Malaysia.

THE FINDINGS OF THE LEARNED TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[31] The learned trial judge found that the defence failed to raise any reasonable doubt on the prosecution's case for each of the charges for the following reasons:

(a) the defence is a mere denial;

(b) a substantial part of the defence are mere afterthoughts;

(c) the defence of the appellant that the items were sent to his house by Zainal Hafiz bin Zaine (SD2) or known as 'Janggut', was never put to any of the prosecution's witness during the prosecution's case;

(d) the evidence of Muhammad Fakhrul Amin bin Mohd Tahar ('SD3') who said that he had easy access to the house of the appellant as he knew where the keys to the house was, was never put to any of the prosecution's witnesses during the prosecution's case;

(e) the defence had called witnesses after witnesses without making any indication as to its purpose as a defence in the prosecution's case;

(f) the evidence of Mohammad Hafiz Hukmi bin Wardi ('SD5'), the brother in law to the appellant, was not relevant to the element of custody and control by the appellant on the drugs found in the house;

(g) based on the explanation by the appellant that despite he had no knowledge that the oil contained cannabis, however the appellant said that he filled up the oil in smaller bottles for medicinal purposes. This defence of the appellant was not supported by any proof or evidence;

(h) there is a contradiction in the evidence of the appellant as to the items seized like the sticker which are labels with a picture of the cannabis leaf and the ingredients which are to be placed and glued onto the bottles and the boxes found in the house. According to the appellant it was sent to the house by SD2, however the evidence of SP3 and SP8 said that both these items were commissioned from their shops by the appellant. All the wordings on the boxes and the design were provided by the appellant. The evidence of SP8 said that the appellant came to his shop and ordered the sticker labels to be placed on the cannabis oil bottles. The appellant came with a sample of the design for the stickers to be printed by SP8. SP3 said that the appellant came to his shop four times to place an order for the boxes which were used to pack the cannabis oil. SP3 said that for each order the appellant paid RM650;

(i) the learned trial judge found that the evidence of SD2 cannot be believed. SD2 said that the cannabis straws ('hampas') has no value after it had been processed, however why was it still being kept in the house of the appellant if it is worthless?

(j) the explanation by the appellant on the third charge was not accepted by the learned trial judge because the drugs which were found are of the same type in the manufacturing of the cannabis oil;

(k) the evidence of Muhamad Aris bin Mohd Mokles ('SD7'), a lecturer in Universiti Putra Malaysia also failed to rebut the evidence of SP6 as SD7 is not a certified qualified chemist;

(l) there is no issue that the first and the second charges were defective when it failed to state the net weight of delta-9-tetrahydrocannabinol, as the evidence of SP6 was credible; and

(m) as for the third charge there was evidence of custody and control and the drugs which were found in the master bedroom is of the same nature of drugs as found in the other part of the house. As the house was occupied only by the appellant and his wife, and the evidence of his wife which exclude others from having possession to the drugs found in the bedroom, the element of possession and knowledge was proven against the appellant.

[32] The learned trial judge found that in view of the aforesaid the defence failed to raise a reasonable doubt on the case of the prosecution. The appellant was therefore found guilty of the three charges and he was convicted and sentenced to death as stipulated under the DDA.

THE ISSUES RAISED BY THE DEFENCE

[33] At the hearing of the appeal before us, the appellant relies on the following three main grounds in his appeal:

The first ground

[34] Firstly, the conviction in respect of the first and the second charges cannot be sustained because the prosecution cannot establish the net weights of the drugs in the first and the second charges.

[35] Under this ground the defence submits that from the evidence of the chemist, SP6, he did not do any quantitative analysis of the dangerous drugs which is the subject of the first and the second charges. This can be seen from the evidence of SP6 which are contained in RR Vol 2A at pp 34–58 particularly at p 58:

> S: My question what are the percentage of delta-9-tetrahydrocannabinol are there in 3010 ml of that point?
>
> J: Analisis itu memang saya tidak buat, untuk quantitation *(sic)* itu memang tidak buat.
>
> S: Saya cadangkan kepada kamu bahawa kamu tidak menjalankan ujian kuantitatif terhadap barang kes H1, H3, H4 dan H6?
>
> J; Ya, betul.

'barang kes H1, H3, H4 dan H6' refers to the subject matter of the first charge.

[36] Further, the defence referred to the witness statement of SP6, the chemist, at RR Vol 3A at p 81 when he stated as follows:

> Dari analisis ini didapati:
>
> (i) Cecair dalam 'H' (c) iaitu botol kaca 'C', 'H1', 'H3' dan 'H4' mengandungi delta-9-tetrahydrocannabinol.
>
> (ii) Kek/Biskut dalam 'H5' mengandungi delta-9-hydrocannabinol.
>
> (iii) Bahan tumbuhan hancur dalam 'H11', H12' dan 'H13' mengandungi delta-9-tetrahydrocannabinol ...

[37] The defence submits that the failure on the part of SP6 to do any quantitative analysis on the drugs of the first and the second charges amounts to a serious omission.

[38] The defence also refers to the request form by the investigating officer to the chemist, SP6 at pp 84–85 of *RR Jld* 3A which specifically requested for 'Bagi menentukan jenis dadah dan berat bersihnya'.

[39] Hence, the defence submits that as the chemist, SP6 failed to do the quantitative analysis of the drugs sent by the investigating officer, the first and the second charges collapsed. It has not been proven beyond reasonable doubt that the net weight of delta-9-tetrahydrocannabinol is as stated in the first and the second charges as it has been mixed with other components. These are capital charges as the appellant is sentenced to death on an amount of dangerous drugs which were not quantified correctly.

[40] As both charges failed to state the actual amount of dangerous drugs, the defence submits that the conviction under the first and the second charges are therefore not safe and ought to be set aside.

The second ground

[41] Alternatively, the defence contends that the dangerous drugs in the first and the second charges are medicinal cannabis and as such cannot be caught within the ambit of the DDA.

[42] The defence submits that the subject matter of these two charges are not within the ambit of the DDA. There was evidence that the appellant had sold these drugs online via his facebook and these are called medicinal cannabis. There is evidence adduced by the defence that these cannabis oil is used as a medicine to treat diseases like cancer, thyroid and thalassemia, amongst a few.

There is evidence from SD6, a patient who vouched for the effectiveness of taking the cannabis oil for his Beta Thalassemia Intermedia and Minor Bipolar ailments.

[43] The defence submits that delta-9-tetrahydrocannabinol serves public good in terms of its medicinal properties and health benefits and that this is not the mischief that the DDA intends to eradicate.

[44] The defence also submits that there has been calls by the executive for a review of the charges against the appellant.

[45] What the defence wish to emphasise to this court is that it is not in the public interest that the conviction against the appellant must be sustained. This is not trafficking of dangerous drugs.

The third ground

[46] The defence submits that in relation to the third charge, the learned trial judge had invoked the presumption under s 37(da) of the DDA. The appellant is presumed trafficking as the amount exceeded 200g. The defence's complaint is that when s 37(da) of the DDA was invoked, it is incumbent on the learned trial judge to make a finding at the end of the defence case whether the defence had succeeded in rebutting the said presumption.

[47] The defence submits that the learned trial judge failed to do so. His Lordship only said at the end of the defence case that for all the three charges, the defence failed to raise a reasonable doubt on the prosecution's case (refer to para 71 of the grounds). Nowhere did he say that he found as a matter of fact that the presumption under s 37(da) had been rebutted or otherwise.

[48] The defence referred us to this court's decision which had been affirmed by the Federal Court in the case of *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406 which held that 'the failure of the learned trial judge to make a finding as to which presumption was relied upon for possession and trafficking and the failure to consider whether the appellant had rebutted the presumption, amounts to a misdirection by way of non-direction which has prejudiced the appellant'.

[49] On these grounds, the defence submits that the third charge cannot stand. The consequences of the failure of the learned trial judge to make a finding whether the presumption was rebutted ought to result in the conviction to be set aside and the cases also do substitute the offence of

trafficking with possession. In other words, the defence submits that at best the appellant is guilty of an offence of possession only.

OUR FINDINGS

[50] We will address the three main grounds as raised in the oral submissions of the appellant.

Ground 1: Whether the convictions in respect of the first and the second charges could be sustained as the prosecution failed to establish the net weights of the dangerous drugs in these two charges

[51] The defence raised the issue on the first and the second charges as being defective as it failed to state the exact weight of the delta-9-tetrahydrocannabinol as the said drugs were mixed with other components. The learned trial judge had considered this issue premised on the evidence of SP6 who said that the methodology that he used to extract delta-9-tetrahydrocannabinol was in accordance to the SOP determined by the Chemistry Department of Malaysia and as recommended by United Nations of Drugs Convention ('UNODC'). Further it was explained by SP6 in his re-examination as follows:

> S: Rujuk kepada witness statement kamu, jadi di dalam kes ini saya akan simpulkan Cross-Examination peguam, terdapat 2 jenis iaitu satu kaedah yang digunakan untuk analisa dadah yang berjenis minyak dan satu lagi Cannabis. Bagi Delta-9-Tetrahydrocannabinol khususnya ml, apabila kamu membuat ujian tersebut kamu pasti kesemua bahan yang kamu analisa tersebut mempunyai dadah tersebut iaitu Delta-9-Tetrahydrocannabinol?
>
> J: Ya, saya pasti.
>
> S: Untuk membantu Mahkamah dan pihak-pihak di sini, bagaimana kamu memastikan dadah tersebut? Saya faham going back to ujian, boleh kamu terangkan sebab persoalan yang ditimbulkan adalah ia juga terkandung minyak iaitu grape seed oil?
>
> J: Ya.
>
> S: Bagaimana untuk tentukan terdapatnya dadah tersebut?
>
> J: Kalau berbalik kepada kaedah analisis tadi untuk jalankan analisis kita perlu extract dadah daripada minyak tadi, saya gunakan ujian ini methanol disebabkan methanol tidak bercampur dengan minyak, saya tidak guna yang biasa dulu organic yang lain ia akan bercampur dengan minyak jadi saya gunakan methanol, jadi methanol akan menarik dadah dalam kes ini Delta-9-Tetrahydrocannnabinol untuk masuk ke dalam methanol dan kemudian hasil ekstrak tadi saya akan jalankan ujian Duguenois-Levine, ujian THC dan juga ujian GCMS.
>
> S: 3 ujian seperti mana yang kamu nyatakan dalam witness statement kamu?

J: Ya.

S: Jadi maksudnya untuk dadah ini sufficient untuk 3 ujian tersebut?

J: Mencukupi disebabkan dalam reccomended method for testing Cannabis yang disediakan oleh UNODC. Cukup dengan 2 ujian confirm dadah.

S: Method mengatakan cukup dengan 2 ujian namun kamu telah membuat more than that 3 ujian?

J: Ya.

.....

S: Jadi Lapuran Kimia yang kamu sediakan iaitu P 58 yang para-para yang mengatakan mempunyai kesan Delta-9-Tetrahydrocannabinol contohnya dalam oil, tumbuhan atau biskut memang mengandungi Delta-9-Tetrahydrocannabinol?

J: Ya.

From the aforesaid evidence of SP6, he had conducted analysis to determine the presence of the drugs delta-9-tetrahydrocannabinol in the first and the second charges.

[52] The failure of the chemist, SP6 to do any quantitative analysis of the drugs delta-9-tetrahydrocannabinol in the first and the second charges is not fatal nor an issue because:

(a) for the first and the second charges, the dangerous drugs are delta-9-tetrahydrocannabinol which is listed under the first Schedule, Part III of the DDA. There is no requirement under the law that requires the actual weight to be stated for charges of trafficking for such drugs;

(b) the provisions under ss 37(da), 39A(2) also do not state or lists that delta-9-tetrahydrocannabinol to be stipulated as to its weight;

In other words, even possession of 0.01ml of delta-9-tetrahydrocannabinol would be sufficient to attract an offence under the DDA;

(c) the charges under the first and the second charges against the appellant are offences under s 39B(1)(a) of the DDA. Hence, the elements that needs to be proved, with particular reference to delta-9-tetrahydrocannabinol are:

(i) the drugs seized from the appellant are dangerous drugs as listed in the first Schedule of the DDA;

(ii) the dangerous drugs were under custody and control and possession of the appellant; and

(iii) the appellant is trafficking in the said drugs.

(d) in the present case, the learned trial judge found that the prosecution had proved the elements of the offence for the first and the second charges. This can be discerned from the findings of the learned trial judge when he said:

> [22] Berasaskan kepada alasan-alasan di atas saya berpuas hati bahawa satu kes prima facie telah dibuktikan oleh pihak pendakwaan terhadap OKT bagi pertuduhan bagi pertama dan kedua.
>
> ...
>
> [61] Di akhir kes pendakwaan yang lalu Mahkamah ini telah memutuskan satu kes prima facie terhadap OKT mengenai ketiga-tiga pertuduhan. Mengenai pertuduhan pertama dan kedua Mahkamah ini mendapati elemen kawalan dan jagaan OKT ke atas dadah-dadah tersebut adalah di bawah seksyen 2 Akta Dadah Berbahaya 1952 dimana salah satu elemen di dalam seksyen itu telah berjaya dibuktikan oleh pihak pendakwaan iaitu 'Manufacturing' ...

(e) once the prosecution had proved the elements of possession and trafficking of the dangerous drugs delta-9-tetrahydrocannabinol, the amount or quantity of the same seized is irrelevant. The court is entitled to convict the accused person under s 39B(1)(a) of the DDA for trafficking.

[53] The learned trial judge had referred to the evidence of SD7 who had questioned the method used by the chemist, SP6 in extracting the drugs from the liquid oil, was insufficient and was an outdated methodology. SD7 testified that the chemist, SP6 should have used an additional methodology, namely HPLC or high performance liquid chromatography which uses solvents. However it was the findings of the learned trial judge that SD7 did not say in his testimony that the test which uses gas, namely GCMS, which was employed by SP6, could not produce THC or delta-9-tetrahydrocannabinol.

[54] It was also the findings of the learned trial judge that when SD7 was cross-examined, he said that he had never done any analysis on the drugs THC but had only attended courses on the same. SD7 also said that he is not a qualified chemist certified by the Chemistry Department of Malaysia. His evidence appears purely theoretical in nature which was never put into practice, as compared to the evidence of SP6 who is a qualified chemist certified by the Chemistry Department of Malaysia and had vast experience in the field of analysis of various types of drugs. Thus, SD7 could not claim to have any expertise in analysis of drugs THC. Therefore, in the absence of the evidence of SD7 as to expertise in THC, there is no expert evidence adduced by the defence to rebut the evidence of SP6, the chemist, whose evidence the learned trial judge had accepted as being credible.

[55] The learned trial judge was thus justified in accepting the evidence of SP6 as being credible as compared to the evidence of SD7 that failed to challenge the evidence of SP6.

[56] The defence did not adduce any other evidence to challenge the evidence of SP6 in this respect. Hence the evidence of SP6 stands unrebutted. The learned trial judge did not err in this respect.

Ground 2: Whether the Dangerous Drugs in the first and the second charges were medicinal cannabis and as such are not caught within the ambit of the DDA

[57] The defence contends that the learned trial judge erred when he failed to appreciate that even if there were activities of manufacturing (which was denied) by the appellant, they were meant for public good as the appellant was processing it for sale of the same as medicinal marijuana or cannabis which activities were not caught within the mischief of the DDA. The medicinal marijuana is not dangerous drugs.

[58] This contention by the defence was considered by the learned trial judge at great length. The learned trial judge had referred to certain excerpts of the testimony of the appellant where he agreed that the oil which he sold did not have any certification/verification by any body of doctors or medical bodies, or even the Health Ministry as to its medicinal properties or health benefits.

[59] The expert witness called by the defence, SD7 agreed that cannabis has never been verified/certified as having some health benefits in our country and it has never been used as medicine in any hospitals in our country.

[60] The learned trial judge agreed with the submission by the learned DPP that in the absence of any acknowledgement or verification by the Ministry of Health or any medicinal practitioners of any medicinal or health benefits of cannabis, whatever claim by the defence that cannabis has some medicinal benefits only amounts to quackery or health fraud, which amounts to a promotion of fraudulent or ignorant medical practices.

[61] The appellant had stated in his defence that he does not know that his act contravened any law of the country. However, such ignorance of the law is not a defence. The appellant knew that he was selling oils that contain cannabis. This has been considered by the learned trial judge when he held in his judgment at *RR Jld* 1 pp 41–42 when he said that:

> [62] Pembelaan yang diketengahkan oleh OKT juga jelas bersifat penafian semata-mata terhadap ketiga-tiga pertuduhan, mengenai pertuduhan pertama, penjelasan OKT adalah walaupun dia tahu bahawa minyak tersebut mengandungi

dadah Cannabis akan tetapi OKT berkata beliau mengisi ke dalam botol-botol kecil bertujuan untk perubatan bagi penyembuhan beberapa jenis penyakit. Pembelaan OKT ini tidak disokong oleh mana-mana keterangan daripada doktor atau disahkan oleh Kementerian Kesihatan Malaysia. Walaupun pembelaan ada memanggil SD4, ibu OKT dan SD6, pengguna minyak ganja tersebut akan tetapi kedua-dua keterangan mereka tidak disahkan oleh lapuran perubatan daripada mana-mana pegawai perubatan.

[62] We do not find any flaw in such findings by the learned trial judge as there is no supportive evidence from any medical bodies or from the Health Ministry to confirm the contention of the appellant that the drugs possesses medicinal properties which is beneficial to the public. The act of the appellant in manufacturing the drugs is subjected to the laws of the country, with particular reference to the DDA. There is no exemption nor license granted to the appellant to possess, manufacture, handle, process or for the sale of the drugs under the DDA or any laws for that matter. There is also no authorisation provided under the DDA or any regulations thereunder which allows the appellant to possess the drugs.

[63] Therefore the contention by the appellant that the manufacturing of the cannabis was for medicinal purposes for public good, are not caught within the mischief of the DDA, has no merits. There was no error by the learned trial judge in making such findings which warrants our appellate intervention.

[64] On the submission by the defence that there has been calls by the executive to review the charges against the appellant, at this stage, that is beyond our call. The appellant submits newspaper reports and articles evidencing these calls and suggestion by the executive. Our view is this: Once the charges are registered with the courts, save and except it being withdrawn by the public prosecutor, the court's duty is to consider the evidence that was adduced by the prosecution before the courts and to decide according to law. It is the prerogative of the public prosecutor whether to charge a person under the relevant laws and the duty of the courts is to hear the matter and decide accordingly.

Ground 3: The failure by the learned trial judge to make a finding whether the defence had rebutted or otherwise the presumption under s 37(da) of the DDA

[65] The learned trial judge had made affirmative findings on possession for the third charge (refer to *RR Jld* 1, pp 22–24, paras 23–27). As the weight of the drugs, cannabis had exceeded the minimum statutory requirement under s 37(da)(vi) of the DDA (ie 200g or more), the learned trial judge had applied the presumption under s 37(da) of the DDA after making an affirmative

findings of possession. Hence, the learned trial judge did not err when he applied the said presumption. A

[66] The complaint by the defence is that, the learned trial judge failed to appreciate the defence of the appellant. There is no merit in this contention as the learned trial judge had clearly in his grounds considered the evidence given: B

(a) by the appellant in his defence (refer to *RR Jld* 1, pp 24–27);

(b) by SD2 (refer to *RR Jld* 1, pp 28–29);

(c) by SD3 (refer to *RR Jld* 1, p 29); and C

(d) by SD4 and SD5 (refer to *RR Jld* 1, pp 29–30).

[67] We find that the learned trial judge had evaluated the evidence of the defence and also compared it with the evidence of the prosecution's witnesses in relation to the charges preferred against the appellant (*RR Jld* 1, pp 30–36). D

[68] The appellant also raised the contention that the learned trial judge failed to evaluate whether the appellant was in possession of the drugs. This is also misconceived as 'possession' was considered by the learned trial judge in paras 61 and 67–68 in his grounds. E

[69] It was also contended by the defence that the learned trial judge erred when he did not rule at the end of the defence case that the appellant had rebutted s 37(da) of the DDA. We found that there is indeed a failure by the learned trial judge to make the necessary finding on whether the presumption under s 37(da) of the DDA was rebutted. It is incumbent for the learned trial judge to make a ruling whether s 37(da) had been rebutted. We refer to the cases of *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406 and *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585. F G

Given that the learned trial judge did not make any finding whether the prosecution had rebutted the presumption of trafficking, we set aside the conviction under s 39B(2) in respect of the third charge and substituted with a conviction under s 6 punishable under s 39A(2) of the DDA. H

OTHER PERTINENT ISSUES I

[70] Apart from the three main grounds that was orally submitted by the appellant at the hearing of the appeal before us, there are other pertinent points raised in the petition of appeal by the appellant which we will address in the following paragraphs.

Issue on 'manufacturing'

[71] It was raised in the petition of appeal (in ground No 2 of the petition) that the appellant denied that there was manufacturing activities of the dangerous drugs at the house by the appellant. However, the learned trial judge made findings that there was manufacturing by the appellant. We do not find any error in this respect as there was sufficient explanation given by the learned trial judge on his findings that the appellant was indeed manufacturing delta-9-tetrahydrocannabinol. This was premised on the facts that there are apparatus and materials found on the premises for processing of cannabis to produce delta-9-tetrahydrocannabinol. From the facts, appellant utilises cannabis as the main ingredient to produce delta-9-tetrahydrocannabinol.

[72] These findings by the learned trial judge is justified premised upon the evidence of SP6 who gave evidence as to the purpose of the apparatus and the paraphenalias which were found in the house. The relevant evidence of SP6 are as follows:

> Resin cannabis yang mengandungi delta-9-tetrahydrocannabinoil telah diekstrak dari tumbuhan genus cannabis atau dari tumbuhan cannabis sendiri telah diekstrak menggunakan grape seed oil ... saya syaki bahan tumbuhan cannabis telah dihancurkan menggunakan pengisar dan dipanas/dimasak menggunakan slow cooker. Berkemungkinan grape seed oil telah digunakan untuk memasak tumbuhan cannabis tersebut dan selepas dimasak ia ditapis dan hasil tapisan minyaknya dimasukkan di dalam botol-botol kecil.

[73] The evidence from Nadiah bt Rahmat ('SP10'), the wife of the appellant, said in evidence that the manufacturing was done by the appellant using the materials as can be seen from the photographs in exh P56. The packaging was done by the appellant himself without any help from SP10.

[74] SP10 in evidence said that she knows that the appellant was operating a business of selling herbal medicine as a remedy for cancer. However, she does not know the ingredients that the appellant uses to manufacture the herbal medicine. She also does not know that the appellant uses cannabis to produce the herbal medicine.

[75] SP10 also said that the appellant sells the herbal medicine through facebook although SP10 could not recall the name of the facebook. Neither does she know how the appellant processed the herbal medicine as she usually works between 7am until 6pm.

[76] Through the evidence of SP10 and SP2, there were no other occupants of the house when it was raided by the police at the material time other than the

appellant and SP10, his wife. This evidence was supported by SP5, the owner of the house, who confirmed that the house was only occupied by the appellant and SP10.

[77] The learned trial judge agreed with the learned DPP that in cases of 'manufacturing' the element of possession need not be proven. The learned trial judge found support in the case of *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652 which held that:

> The word 'includes' is a word of extension and not of definition (see *Public Prosecutor v Hun Peng Khai & Ors* [1984] 2 MLJ 318). In our view, the above characterising of *the word 'manufacture' is extremely wide and can include other acts not explicitly categorised in* s 2. From the evidence that has been presented, in our judgment, the circumstances prevailing at the factory premises at the time in question show that all the accused persons were present there for the purpose of 'manufacturing' methamphetamines. Based on the discovery of numerous apparatus and chemical materials that can be used to process drugs found in the factory where all the five accused persons were arrested, the factory in question is as a matter of fact a drug manufacturing setting. The discovery of the apparatus and chemical materials support the finding that the said factory was used as a clandestine drug laboratory.
>
> For the proper determination of this issue, it must be borne in mind that, as *stated in s 2 of the DDA, the term 'manufacture' includes numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Pendakwa Raya v Mansur bin Mohd Rashid & Anor* [1996] 3 MLJ 560). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before trafficking definition in s 2 of the DDA can be invoked. (Emphasis added.)

[78] The facts in the present case also present strong circumstantial evidence which points to an irresistible inference that the appellant was manufacturing delta-9-tetrahydrocannabinol for the first and the second charges.

[79] The evidence also show the presence of small bottles and papers which was later turned into boxes to pack the drugs for purposes of sale. These facts show that the appellant had intention to sell the products manufactured.

[80] The learned trial judge found overwhelming evidence that pointed to the appellant being involved in the manufacturing of dangerous drugs which was evidenced by the following:

(a) exh P60, the chemist report which stated that there are transparent cylinders, a transparent glass bottle 'Alshifa', five bottles 'Basso', five bottles 'Borges', blender jar 'Tefal' where all bore traces of delta-9-tetrahydrocannabinol;

(b) there were also apparatus which were found at the house like an electric pot 'Media Slow Cooker', three plastic funnels, one plastic jug, one cut into half bottle-bottom half, two cut plastic bottles-upper part, a box of 'diamond' aluminium foil and four cloth strainer; and

(c) grape seed oil, cannabis, straws of cannabis, cannabis which had been soaked in oil.

[81] SP6, the chemist explained the purpose of the apparatus and the drugs materials which were found in the house as follows:

> J: Daripada kes ini saya mensyaki bahawa resin Cannabis yang mengandungi Delta-9-Tetrahydrocannabinol telah diekstrak dari tumbuhan genus cannabis atau dari tumbuhan cannabis sendiri telah diekstrak menggunakan grape seed oil (biji anggur).
>
> Saya ulang balik.
>
> Saya mensyaki daripada kes ini bahan tumbuhan cannabis telah dihancurkan menggunakan pengisar dan dipanaskan/dimasak menggunakan slow cooker, dimasak dengan minyak di dalam slow cooker. Berkemungkinan grape seed oil telah digunakan untuk memasak tumbuhan cannabis tersebut dan selepas dimasak ia ditapis dan hasil tapisan cannabis tersebut dan selepas dimasak ia ditapis dan hasil tapisan minyaknya dimasukkan di dalam botol-botol kecil.

[82] Premised on the aforesaid, the issue raised by the appellant with regard to the issue of 'manufacturing' clearly has no merits. There has been no error by the learned trial judge in arriving at his findings that based on the apparatus and the materials found in the house proved that the appellant was involved in the manufacturing of dangerous drugs.

Issue on possession

[83] As to the charge of trafficking of cannabis, the appellant contends that the learned trial judge had erred when His Lordship failed to make any findings of possession (ground No 4 in the petition).

[84] We disagreed with the submission of the appellant. The learned trial judge had made findings that the appellant had custody and control and actual possession of the dangerous drugs in the house. The evidence can be seen from the following:

(a) the evidence of SP7 who said that when he went into the said house, he saw apparatus for smoking drugs and bottles which was arranged;

(b) the evidence of SP7 and SP9 with regards to the drugs cannabis which were seized by referring to the search list and the handing over list;

(c) the evidence of SP5 who confirmed that the house was rented out to the appellant and that only the appellant and his wife (SP10) stayed there;

(d) the evidence of the neighbour (SP2) to the appellant, who also confirmed that only the appellant and his wife (SP10) stayed at the house;

(e) SP3 and SP8 confirmed that the box and the stickers of label which were found in the appellant's house were commissioned by the appellant himself from them;

(f) the DNA of the appellant was found from the toothbrush and the shirt found in the house;

(g) the wife of the appellant, SP10 confirmed that the items in the house belongs to her husband, the appellant and it was handled by the appellant. All the items were packed by the appellant and SP10 had nothing to do with the materials or the drugs found in the house;

(h) SP7 and SP9 confirmed that when the police raided the house, only the appellant and his wife (SP10) were present in the house;

(i) SP7 also in his evidence confirmed that the appellant followed the raiding officers when they were making a search of the house; and

(j) as to the issue of knowledge on the part of the appellant of the drugs, there are evidence of conduct of the appellant which are relevant which showed that the appellant had knowledge of the drugs. According to the evidence of SP7 when he introduced himself as police officers to the appellant, the appellant was shocked and stunned. This amongst other evidence, according to the respondent showed that the appellant had knowledge of the drugs.

[85] The learned trial judge also made findings as to actual possession by the appellant of the cannabis on the third charge as follows:

> [23] Mengenai Pertuduhan Ketiga, menurut keterangan SP7, beliau telah merampas dadah jenis Cannabis di bilik tidur OKT dan isterinya di tingkat atas di dalam beg kertas kuning (Eksibit P20) yang berada di atas katil di dalam bilik itu. Peguambela terpelajar berhujah bahawa dadah tersebut telah gagal dibuktikan dijumpai di tempat kejadian kerana tidak dinyatakan di dalam borang bongkar yang disediakan oleh SP7 dan tidak kelihatan di dalam mana-mana gambar di

tempat kejadian, menurut peguambela lagi, SP7 sendiri tidak membuat tandaan ke atas beg tersebut jika dirujuk kepada Nota Keterangan, semasa menjawab soalan dari YA Hakim.

[24] Mengenai isu ini, walaupun SP7 mengatakan beliau tidak catit di manakah beg P 20 ini dijumpai dan beliau gagal membuat tandaan ke atas beg ini, saya berpuas hati bahawa penjelasan dan pengakuan SP7 tersebut adalah jujur, tidak mungkin SP7 akan menganiayai OKT dengan memberikan keterangan tidak benar.

[25] Disini saya merujuk kepada kes *PP vs Abdul Latif bin Sakimin* [2005] 6 MLJ 351, kes *State of Kerala vs M.M. Mathew* [1978] SCC 65 dan kes *Lam Chun Wing Joe vs PP* [2012] 7 MLJ 504, di dalam kes-kes di atas telah diputuskan, walaupun terdapat ketinggalan di dalam siasatan akan tetapi kejujuran penjawat awam tidak boleh dipertikaikan, tambahan pula di dalam kes-kes yang membawa hukuman mati.

[26] Di dalam kes ini, dadah yang ditemui di dalam beg P 20 tersebut adalah sama jenis dengan dadah di dalam pertuduhan pertama dan kedua. Juga semasa SP7 merampas dadah tersebut telah dijumpai dan dirampas dari premis tersebut di mana OKT mempunyai kawalan sepenuhnya ke atas premis tersebut.

[27] Keterangan SP8 *(sic)*, isteri OKT juga telah menolak anggapan pemilikan oleh orang lain selain daripada OKT ke atas dadah tersebut. Oleh itu Mahkamah ini memutuskan bahawa pihak pendakwaan juga telah berjaya membuktikan elemen jagaan dan kawalan serta pengetahuan OKT mengenai dadah di dalam pertuduhan ketiga.

[86] The learned trial judge concluded as follows:

[61] Di akhir kes pendakwaan yang lalu Mahkamah ini telah memutuskan satu kes prima facie terhadap OKT mengenai ketiga-tiga pertuduhan. Mengenai pertuduhan pertama dan kedua Mahkamah ini mendapati elemen kawalan dan jagaan OKT ke atas dadah-dadah tersebut adalah dibawah seksyen 2 Akta Dadah Berbahaya 1952 di mana salah satu elemen di dalam seksyen itu telah berjaya di buktikan oleh pihak pendakwaan iaitu 'Manufacturing'. Manakala pertuduhan ketiga pula di bawah seksyen 37(da) Akta Dadah Berbahaya 1952.

...

[67] Saya berpuas hati bahawa pihak pendakwaan telah pun 'exclude of all other persons' seperti yang diputuskan di dalam kes Chan Pean Leon vs PP (diatas) di mana pihak pendakwaan telah berbuat demikian dengan memanggil SP10, seterusnya selepas menyoal balas SD2 dan SD3.

[68] Saya bersetuju bahawa, pihak pendakwaan hanya di kehendaki oleh undang-undang untuk membuktikan elemen kawalan dan jagaan bukannya pemunyaan, di dalam kes ini fakta-fakta kes adalah melimpah ruah @ 'overwhelming' bagi menunjukkan OKT mempunyai kawalan dan jagaan serta pengetahuan ke atas dadah tersebut.

[87] The learned trial judge in his grounds correctly made findings on the issue of actual possession at paras 23–27, 61 and 67–68 of his grounds, which we had stated in para 86 of this judgment.

[88] Given the circumstances, the contention by the defence that the learned trial judge erred when he failed to make findings on possession with regards to the trafficking charges, is clearly without merits.

CONCLUSION

[89] Therefore, in respect of the first and the second charges, we found no appealable error on the part of the learned trial judge. The appeal in respect of the first and the second charges is therefore dismissed. We affirmed the conviction and the death sentence in respect of the first and the second charges against the appellant under the DDA.

[90] In respect of the third charge, we find there is merit in the appeal which warrants appellate intervention. We find the conviction under s 39B(1)(a) is unsafe. As such we set aside the conviction under s 39B(1)(a) on the third charge. We find the appellant guilty of possession and we substituted it with a conviction under s 6 punishable under the s 39A(2). After hearing mitigation from the defence counsel, we are of the view that a sentence of seven years imprisonment from the date of the arrest (7 December 2015) and ten strokes of whipping is appropriate.

Order accordingly.

Reported by Ashok Kumar